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BILL ANOATUBBY

GOVERNOR

August 26, 2013

Ms. Tracie Stevens, Chairwoman
National Indian Gaming Commission
1441 L Street N.W., Suite 9100
Washington, DC 20005

Dear Chairwoman Stevens:

The Chickasaw Nation is pleased to submit the enclosed comments on the National Indian Gaming Commission's (NIGC) proposal to reinterpret its position regarding the classification status of one-touch bingo games. This proposal seeks to bring an end to years of debate regarding the proper classification of bingo games utilizing one-touch electronic aids. We commend the NIGC's initiative to adopt a more reasoned and principled approach to game classification, and believe the proposal, if adopted, will bring much needed clarity and certainty to the tribal gaming industry.

Thank you for your consideration of our comments on this important matter. We look forward to continuing to work closely with the NIGC in the spirit of the government-to-government relationship and in accordance with federal law and policy.

Sincerely,

Bill Anoatubby
Bill Anoatubby, Governor
The Chickasaw Nation

Enclosure

**COMMENTS OF THE CHICKASAW NATION ON THE
NATIONAL INDIAN GAMING COMMISSION'S
PROPOSED REINTERPRETATION OF ONE-TOUCH BINGO**

The Chickasaw Nation ("Nation") is pleased to submit the following comments in response to the National Indian Gaming Commission's ("NIGC") proposal to reinterpret a previous decision regarding the classification of electronic "one-touch" bingo as a Class III electronic facsimile. This proposal is a welcomed and appreciated effort by the NIGC to bring much needed and much desired clarity and stability to the tribal gaming industry, particularly in relation to the use of technological aids in the play of Class II bingo. By this letter, we wish to express our strong support for the proposed reinterpretation, which we believe represents a more viable and legally sound approach to classifying electronic bingo games.

The distinction between Class II and Class III gaming under the Indian Gaming Regulatory Act ("IGRA") has historically been among the most contested aspects of the statute. This debate over the proper classification of games under IGRA arose in the early 1990s as gaming manufacturers began introducing electronic enhancements to the play of bingo. Even though the essential character of the game remained unchanged, some federal authorities viewed the visual similarity between electronically aided bingo games and traditional slot machines as blurring the line between electronic aids to the play of Class II games and Class III electronic gambling devices.

We emphasize, however, that IGRA is unambiguously clear on the issue of classifying electronically aided Class II games. In enacting IGRA, Congress placed only three requirements on a game of bingo and made clear that bingo is bingo so long as the game satisfies the three statutory elements. It is therefore unreasonable and contrary to law to classify an electronically aided Class II game as Class II gaming based on superficial features unrelated to the three statutory elements of bingo.

In spite of this, the NIGC determined in a 2008 letter to the Metlakatla Indian Community that Class II gaming did not include bingo games utilizing an electronic "auto-daub" feature. According to the 2008 letter, such games did not constitute Class II bingo because they lacked the requisite "competition" element essential to meeting the statutory definition of Class II bingo. Since the game did not require players to participate and compete with each other by taking an additional step to cover the numbers on their virtual bingo cards, the game was a Class III electronic facsimile of a game of chance. In addition, the letter concluded that since the game system covered the numbers on behalf of the player,

all of the fundamental characteristics of the bingo game were contained in the system, thereby rendering the system a Class III electronic facsimile.

The 2008 letter was met with strong opposition from tribal governments, regulators, and other stakeholders who objected to such a narrow interpretation of Class II bingo under IGRA. Such interpretation not only imposed additional bingo requirements not intended by Congress, but also contradicted Congress' intent to encourage the use of modern technology in the play of Class II games. In enacting IGRA, Congress not only anticipated but intended for the Class II gaming industry to evolve and grow through new technological developments. As noted in the proposal and reflected in the legislative history of IGRA, Congress intended for tribal governments to "take advantage of modern methods of conducting Class II games" and sought to provide "maximum flexibility" in this regard.¹

Equally troubling was the fact that the 2008 letter reflected legal interpretations clearly inconsistent with applicable case law. Federal courts have continuously held that the three statutory requirements of bingo "constitute the sole legal requirements for a game to count as Class II bingo." The case law makes clear that the classification of bingo games turns not upon the electronic features of the game, but upon its fundamental elements and the extent to which such elements satisfy the statutory requirements.

Furthermore, federal courts have repeatedly affirmed that it is permissible for an aid to a Class II bingo game to assist the player by automatically covering drawn numbers. In *United States v. 103 Electronic Gambling Devices*, the court dismissed the argument that a gaming device failed to satisfy the definition of bingo because of its electronic daub feature, stating that "[t]here is nothing in IGRA . . . that requires a player to independently locate each called number on each of the player's cards and manually 'cover' each number independently and separately."² Moreover, federal courts have deemed the manner in which a player "covers" numbers as irrelevant for classification purposes. As emphasized by the *103 Electronic Gambling Devices* court, "IGRA merely require[s] that a player cover the numbers without specifying how they must be covered."³

The NIGC's current proposal acknowledges that the 2008 letter was based on misguided assumptions not supported by federal law, policy, or legal precedent. In the proposal, the NIGC successfully refutes the assertions made in the 2008

¹ S. Rep. No. 100-446, at 9 (1998).

² *United States v. 103 Electronic Gambling Devices*, 1998 WL 827586, at *6 (N.D. Cal. Nov. 23, 1998), *aff'd* 223 F.3d 1091 (9th Cir. 2000).

³ *Id.*

letter to conclude that one-touch bingo does in fact meet the statutory definition of the game of bingo. We commend the NIGC for correcting the flawed analysis on which the 2008 letter was based and proposing a more reasoned and principled approach to game classification that supports rather than contradicts federal case law. We wholeheartedly agree with the NIGC's statement that such approach is "more in keeping with IGRA's definition of bingo and will bring clarity to the industry."⁴

For the foregoing reasons, we strongly encourage the NIGC to move forward in formalizing this proposal to clarify that one-touch bingo is a Class II bingo game under IGRA and its implementing regulations. As you are well aware, Class II gaming has been an essential source of governmental revenue for many tribal governments, including the Nation. We believe this proposal will help secure an economically viable form of gaming for all tribal governments as well as the right to enjoy the full benefit of the law as intended by Congress when it enacted IGRA. Thank you for your favorable consideration of our comments.

⁴ *Electronic One Touch Bingo System*, 78 Fed. Reg. 37998, 37999 (June 25, 2013).